The latch for the padlock was there and according to his evidence he said a padlock could be used. He had used a padlock before and when the key was lost, he could have purchased another one. There was in fact a padlock found by Inspector Jasbir Singh in the cupboard of the room and produced in court as P28 which could be used to padlock the door.

There are also evidence to state that the grille and the main door to the premises 54-B, Jalan Perang required keys to be opened. If such places were locked, certainly it infers security was needed.

I also find that the said door to room B was locked from the evidence of Ah Yap (DW2) when he said that Kenny and Yoong Thien Soong occasionally came to the saloon to take the keys to open first accused's room. Since Yoong Thien Soong was also a resident in 54-B, Jalan Perang why did he need to collect keys from first accused? He would have his own keys to gain entry to premises 54-B, Jalan Perang. This infers that he needed the key to open the first accused's room B.

Learned counsel for the first accused quoted to me the decision of Mr Justice Shankar in the case of *PP* v *Aris bin Yunos*[3] and my decision in *PP* v *Chong Wei Kian*[4] where decisions were made relating to the 'exclusive right' to the use of the premises or room. I like to stress that 'exclusive right' must be viewed in the light of all circumstances of each particular case. It does not mean that once the accused person tendered evidence that some of his friends entered the room with or without his permission it is sufficient evidence to say that the drugs found therein did not belong to the accused and that he has lost his exclusive use of the room. All the facts of each case must be viewed separately to determine the element of exclusive right.

In this case I find that the first accused had still the care and custody of the things in his said room when the place was raided by the police. There was no evidence by the first accused that his friends were in his rooms the night before or the days before nor was there any evidence by him that his friends took his keys just before the police raid. If the first accused had lost the exclusive right to the room, it was only for a temporary nature and he has regained it when he returned. He was there in the room with his girlfriend for the whole night and he would have been aware of what was contained therein especially in a room which furniture consist of only the plastic cupboard, the mattress, the mini compo, the air cooler and the shoe boxes.

The first accused admitted that the two shoe boxes belong to him and he could have disposed of the same. I find it unacceptable when the first accused stated that he was not aware of the contents therein. He had ample opportunity to look into it and was not curious according to him to do so. The presence of these shoe boxes were evidently meant for some specific purposes as no other containers or pieces of like furniture for storage were found in the room. As they were meant for specific purposes and not thrown away, the accused should be concerned of what was contained therein. When the room is small, there would be more occasions for the first accused to look into it most of the time.

Under all the circumstances as stated above, I find that the first accused has not rebutted the various presumptions stated earlier under the Dangerous Drugs Act 1952 and neither has he rebutted the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 when the drug so found exceeds 15g in weight.

I therefore find the first accused guilty of the amended charged.

First accused convicted. Second accused acquitted.

Solicitors: *Abdul Rahman Saad & Associates.*

Reported by *Zarinah Marican*

Kesatuan Pekerja-Pekerja Perusahaan Logam v KL George Kent (M) Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8-32-128-88
EUSOFF CHIN J
29 AUGUST 1989

Labour Law — Collective agreement — Allegation of failure to comply with collective agreement — Industrial Court failed to consider relevant provisions of collective agreement and subsidiary legislation — Whether this amounts to jurisdictional error — Application to quash decision of Industrial Court — Code of Conduct for Industrial Harmony 1975, cll 20, 21, 22(a)(ii), 22(b)(ii), (iv), (v) & 23

Administrative Law — Certiorari — Application to quash decision of Industrial Court — Whether Industrial Court had failed to consider relevant provisions of collective agreement and Code of Conduct for Industrial Harmony — Error in jurisdiction

Five employees of the respondents were retrenched from their jobs as supervisors and postal despatch clerks, after which the respondents continued to recruit workers for the posts of operators. It was argued before the Industrial Court that under the collective agreement by which all parties were bound and under the Code of Conduct for Industrial Harmony, the respondents should have offered the posts of operators to the five retrenched employees. The Industrial Court held that the respondents were not obliged to offer the operators' posts to the five employees because the employees had not applied to the post, and because the respondents had intended to abolish the retrenched employees' jobs. The applicant then applied to quash this decision.

Held, allowing the application and directing that it should determine the dispute afresh:

(1) It appears that the Industrial Court had not considered the provisions of art 10.1 of the collective agreement

which says that 'during the duration of the agreement ... both parties shall abide by the Code of Conduct for Industrial Harmony'. Under cl 23 of the Code, retrenched employees 'should be given priority of engagement/re-engagement, as far as possible, by the employer when he engages workers'.

(2) The evidence shows that the respondents continued to engage operators and temporary operators immediately after the retrenchment exercise, while cl 23 of the Code required the respondent to offer the posts to the retrenched employees.

(3) As to the Industrial Court's view that the employees should have applied for the posts, this is an unreasonably way if interpreting cl 23 since only the employer would know if there exists any vacancy (permanent or otherwise), and the employer has the duty to make the offer. If the retrenched employee refuses to accept the offer because of the lower salary or for other reasons, then the employer would be justified in offering the vacancy to a third party.

(4) The Industrial Court made a jurisdictional error in not considering cl 23 which both parties had agreed to follow. For that reason the Industrial Court came to the conclusion that 'nowhere it was suggested that the five claimants should be offered the post of operators ...', and because of that it came to the wrong interpretation that it was the duty of the five employees to apply for the vacancies.

(5) The Industrial Court should have asked itself whether the respondents had compiled with cl 23 of the Code of Conduct. The evidence before the Industrial Court shows that they had done so. It should also ask whether, under the circumstances of the case, the respondents had acted reasonably in not offering the five employees alternative employments as operators before the Industrial Court accepted redundancy as sufficient cause for dismissal.

[Bahasa Malaysia summary

Lima orang pekerja pihak responden telah dihenti kerja dari pekerjaan mereka sebagai penyelia dan kerani penghantar pos. Selepas itu pihak responden terus mengupah pekerja-pekerja untuk jawatan operator. Telah dihujah di depan Mahkamah Perusahaan bahawa di bawah perjanjian kolektif yang mengikat semua pihak dan di bawah Kanun Kelakuan untuk Keharmonian Perusahaan, pihak responden seharusnya menawarkan jawatan operator kepada lima orang pekerja yang telah dihenti kerja itu. Mahkamah Perusahaan memutuskan bahawa pihak responden tidak perlu menawarkan jawatan operator kepada lima orang pekerja itu kerana mereka tidak memohon untuk jawatan tersebut, dan kerana pihak responden beniat untuk membasmikan jawatan pekerja-pekerja yang telah dihenti kerja itu. Pemohon telah memohon untuk membatalkan keputusan itu.

Diputuskan, membenarkan permohonan itu dan memerintahkan supaya perselisihan itu didengar semula:

(1) Nampaknya Mahkamah Perusahaan tidak menimbang peruntukan perkara 10.1 perjanjian kolektif itu yang mengatakan bahawa 'semas jangka masa perjanjian ... keduadua pihak harus menurut Kanun Kelakuan untuk Keharmonian Perusahaan'. Di bawah fasal 23 Kanun itu, pekerja-pekerja yang dihenti kerja 'harus diberi keutamaan bagi pengupahan/pengupahan semula, setakat yang boleh, oleh majikan bila majikan mengupah pekerja'.

(2) Keterangan menunjukkan bahawa pihak responden terus mengupah operator dan operator sementara sejurus selepas gerakan penghentian kerja, manakala fasal 23 Kanun itu menghendaki pihak responden menawarkan jawatan itu kepada pekerja-pekerja yang dihenti kerja.

(3) Berkenaan dengan pandangan Mahkamah Perusahaan bahawa pekerja-pekerja itu seharusnya memohon bagi jawatan-jawatan itu, itu adalah cara yang tidak menasabah bagi mentafsirkan fasal 23 kerana cuma pihak majikan yang tahu samada terdapat sebarang kekosongan (tetap atau sebaliknya), dan pihak majikan mempunyai tugas membuat tawaran. Jika pekerja yang dihenti kerja enggan menerima tawaran itu kerana gaji yang lebih rendah atau kerana sebab-sebab yang lain, maka bolehlah majikan menawarkan kekosongan itu kepada pihak ketiga.

(4) Mahkamah Perusahaan telah membuat kesalahan bidang kuasa dalam tidak menimbang fasal 23 yang telah dipersetujui oleh kedua-dua belah pihak. Bagi sebab itu Mahkamah Perusahaan telah membuat keputusan bahawa 'tidak dicadangkan di mana-mana yang kelima-lima penuntut harus ditawarkan jawatan operator ...', dan oleh kerana itu membuat tafsiran yang salah bahawa adalah menjadi tugas kelima-lima orang pekerja itu untuk membuat permohonan bagi memenuhi kekosongan.

(5) Mahkamah Perusahaan seharusnya menanyakan ianya sendiri samada pihak responden telah menurut fasal 23 Kanun Kelakuan itu. Keterangan di depan mahkamah menunjukkan bahawa mereka telah berbuat demikian. Ia juga seharusnya menanyakan samada di bawah keadaan kes itu, pihak responden telah bertindak secara menasabah dalam tidak menawarkan kelima-lima pekerja itu pekerjaan alernatif sebagai operator sebelum is menerima kelebihan (redundancy) sebagai sebab yang cukup untuk penghentian kerja.

[*Editorial Note*: The respondents' appeal to the Supreme Court vide Civil Appeal No 02-236-89 was heard on 16 July 1990 and the court (comprising Hashim Yeop A Sani CJ (Malaya) Mohamed Yusoff and Ajaib Singh SCJJ) dismissed the appeal.]

Case referred to

1 *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147 (folld)

KP Gengadharan for the applicant.
A Sreenivasan (Ms) for the respondents.

Cur Adv Vult

Eusoff Chin J: Five employees of the respondents who were members of the applicant union were retrenched by the respondents on 26 November 1986. Four of the retrenched employees who started work with the respondents between 1970 to 1980 as trainee operators were, at the time of their retrenchments, either charge-hands or assistant charge-hands (supervisors); and the fifth employee who started work in 1975 as a sweeper was, at the time of his retrenchment, a postal despatch clerk.

It is not disputed that the respondents under certain circumstances have the right to retrench workers, but that they have to comply with the terms of a collective agreement signed between them and the applicant. It is also not disputed that the respondents have been employing temporary workers as operators, some for as

long as 18 months which is contrary to art 46(2) of the agreement. CW2, Chow Soo Har, who gave evidence for the employer (respondents) before the Industrial Court said that he could offer, but did not make any offer to the five retrenched employees, the jobs of operators if they were prepared to accept an operator's salary. He confirmed that the respondents did not offer alternative employments to the retrenched workers or to transfer them to other departments of the respondents. According to him the retrenchment was the result of the abolition of posts. He said that the number of permanent operators was 124 in November 1986 when the five employees were retrenched, and that in the next month (December) the respondents had recruited 13 temporary workers. The number of temporary workers at the date of hearing in the Industrial Court was 63. The number of permanent workers was not reduced but increased to 128 by January 1988.

At p 7 and p 8 of the award, the chairman of the Industrial Court stated:

> It has been urged that the company could have offered the post of the operators to all the five claimants since they were at one stage of their careers in the company operators and to support this the Code of Conduct for Industrial Harmony is quoted, and in particular the award No 136/1981 is referred. There are a few English cases also cited to support such request.
>
> In this case there is a collective agreement signed between the company and the union, and both parties are fully aware of the contents and conditions of such collective agreement. The first witness for the company sent a letter dated 1 August 1986 giving 'Advance notice of retrenchment' (exh C2) and the union gave a reply dated 11 August 1986, making 'proposals and suggestion to cut cost: ...' nowhere it was suggested that the five claimants should be offered the post of operators, nor the claimants making representation to the company to reduce them to the post of operators. It has been held somewhere if an employee is reduced in his post or his salary the employer is caught with a claim by the employee of a constructive dismissal unless the employee agrees to such reduction.
>
> The union complains that there were temporaries, but this is permitted by the said collective agreement; in fact there is evidence before the court than the union urged upon the company to take the temporaries as permanent workers, and this issue should not be a subject of complaint since the temporaries have been appointed since 1970; except that there are few temporaries, who have exceeded the period of more than six months stipulated in the collective agreement.
>
> It was not necessary for the company to offer the operator's post to all the claimants, (although a member of the panel has suggested it) because the union had not done so, and on the other hand the company's intention was to abolish such posts.

Articles 2 and 10.1 of the collective agreement state:

> 2.1 This agreement shall be deemed to have come into effect on 1 April 1984 and shall continue to remain in force until 31 March 1987 and thereafter unless superseded by a new collective agreement or award.
>
> 2.2 The provisions of this agreement have been accepted by the union and the company in full and complete settlement of all claims submitted by the union to the company regarding general terms and conditions of employment.
>
> 10.1 The union and the company agree that during the duration of this agreement or of any renewal or extension thereof, or during the continuance of any negotiations with a view to reaching a mutually acceptable new agreement, both parties shall abide by the Code of Conduct for Industrial Harmony.

The Code of Conduct for Industrial Harmony launched by the Honourable Minister of Labour on 9 February 1985, is the code of conduct referred to by art 10.1 of the collective agreement. Clauses 20, 21, 22(a)(ii), (b)(iii), (iv), (v) and 23 state:

> 20 In circumstances where redundancy is likely an employer should, in consultation with his employees' representatives or their trade union, as appropriate, and in consultation with the Ministry of Labour and Manpower, take positive steps to avert or minimize reductions of workforce by the adoption of appropriate measures such as:
>
> (i) limitation of overtime work;
> (ii) restriction of overtime work;
> (iii) restriction of work on weekly day of rest;
> (iv) reduction in number of shifts or days worked a week;
> (v) reduction in the number of hours of work;
> (vi) re-training and/or transfer to other department/work.
>
> 21 The ultimate responsibility for deciding on the size of the workforce must rest with the employer, but, before any decision on reduction is taken there should be consultation with the workers or their trade union representative on the reduction.
>
> 22(a) If retrenchment becomes necessary, despite having taken appropriate measures, the employer should take the following measures:
>
> (ii) introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits;
>
> (b) The employer should select employees to be retrenched in accordance with an objective criteria. Such criteria, which should have been worked out in advance with the employees' representatives or trade union, as appropriate, may include:
>
> (iii) consideration for length of service and status (non-citizens, casual, temporary, permanent);
> (v) age;
> (v) family situation;
>
> 23 Employees who are retrenched should be given priority of engagement/re-engagement, as far as is possible, by the employer when he engages workers.

From the Industrial Court's award, it appear that the Industrial Court had not considered the provisions of art 10.1 of the collective agreement which says that 'during the duration of this agreement ... both parties shall abide by the Code of Conduct for Industrial Harmony', and that under cl 23 of this Code retrenched employees 'should be given priority of engagement/re-engagement, as far as possible, by the employer when he engages workers'.

I think the word 'engagement' in cl 23 of the Code means 'engagement' to any post, whereas the word 're-engagement' would refer to engagement to a similar post from which the employee was retrenched. The evidence of CW2 shows that the company continued to engage operators and temporary operators immediately after the retrenchment exercise. Clause 23 of the Code requires the respondent to offer the posts to the re-trenched employees. The Industrial Court's view is that it should be the other way round, ie the employees must apply. I think this is an unreasonable way of interpreting this cl 23 of the Code since only the employer would know if there exists any vacancy (permanent or other-wise), and the employer has the duty to make the offer, and if if the retrenched employee refuses to accept the offer because of the lower salary or for other reasons, then the employer would be justified in offering the vacancy to a third party. A member of the Industrial Court shares this view — see p 8 para 2 of the award. In *Anisminic Ltd* v *Foreign Compensation Commission*,[1] at p 171, Lord Reid said:

> It has sometimes been said it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the require-ments of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was re-quired to take into account. Or it may have based its decision on some matter which, under the provisions set-ting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

I find that the Industrial Court has made a jurisdictional error in not considering cl 23 of the Code of Conduct for Industrial Harmony which both parties to the collec-tive agreement had agreed to follow. For that reason the Industrial Court came to the conclusion that 'nowhere it was suggested that the five claimants should be of-fered the post of operators ...' and because of that it came to the wrong interpretation that it was the duty of the five claimants to apply for the vacancies in the company. The Industrial Court should have asked itself whether the company had complied with cl 23 of the Code of Conduct. The evidence before the Industrial Court shows that the company had not done so. It should also ask whether, under the circumstances of the case, the company had acted reasonably in not offering the five claimants alternative employments as operators before the Industrial Court accepted redundancy as sufficient cause for dis-missing the five claimants.

I therefore made the order prayed for to quash the award of the Industrial Court and direct that it should determine afresh the dispute.

Order accordingly.

Solicitors: *Genga Maha Wong & Co; Skrine & Co.*

Reported by *Azra Moiz*

Goh Ah Ba lwn Timbalan Menteri Dalam Negeri, Malaysia & Satu Yang Lain dan satu tindakan yang lain

MAHKAMAH TINGGI (PULAU PINANG) — PERMOHONAN JENAYAH NO 44-17-90 DAN 44-20-90
ABDUL HAMID PK
6 JULAI 1990

Tahanan Pencegahan — Tahanan di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Pindaan) 1990 — Samada s 3(1)(b) Akta itu berlawanan dengan perkara 8 Perlembagaan Persekutuan — Bolehkah timbalan menteri membatalkan perlanjutan perintah tahanan dan pada hari yang sama membuat perintah baru — Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985, ss 3(3), 5, (4), 6(1), 6A, 11(A)(1)(aa), B(1) & B(2) — Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Pindaan) 1990, ss 3(1)(b) & 6A(2)

Undang-Undang Perlembagaan — Diskriminasi — Pendekatan dan prinsip yang diterima untuk menentukan samada undang-undang itu 'discriminatory' — Perlembagaan Persekutuan, perkara 4 & 8

Pemohon dalam Permohonan Jenayah No 44-17-90 ('pemohon pertama') ditahan atas perintah Timbalan Menteri Dalam Negeri yang dibuat pada 16 Mei 1987 selama dua tahun di Pusat Pemulihan Akhlak, Muar, Johor mulai 18 Mei 1987. Pada 29 April 1989, timbalan menteri mengeluarkan per-lanjutan perintah tahanan yang mengarahkan supaya pemohon pertama ditahan selama dua tahun selanjutnya mulai 17 Mei 1989 di pusat yang sama. Pada 3 April 1990, timbalan men-teri itu mengeluarkan pembatalan perlanjutan perintah taha-nan yang dibuat pada 29 April 1989 dan pada hari yang sama mengeluarkan perintah tahanan baru mengarahkan pemohon pertama ditahan selama 13 bulan di pusat yang sama. Pemohon dalam Permohonan Jenayah No 44-20-90 ('pemohon kedua') pada mula-mula ditahan atas perintah Timbalan Menteri Dalam Negeri yang dibuat pada 21 Julai 1986 yang menga-rahkan pemohon kedua ditahan selama dua tahun mulai 24 Julai 1986 di Pusat Pemulihan Akhlak, Muar, Johor. Pada 21 Julai 1988, timbalan menteri mengeluarkan perlanjutan perin-tah tahanan supaya pemohon kedua ditahan selama dua tahun selanjutnya mulai 23 Julai 1988 di pusat yang sama. Pada 3 April 1990, timbalan menteri mengeluarkan pembatalan per-intah perlanjutan itu dan pada hari yang sama mengeluarkan perintah tahanan baru supaya mengarahkan pemohon kedua ditahan selama satu tahun di pusat yang sama.